UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING CO. d/b/a THE REGISTER-GUARD, and EUGENE NEWSPAPER GUILD CWA LOCAL 37194	)))))))))	Cases: 36-CA-8743-1 36-CA-8849-1 36-CA-8789-1 36-CA-8842-1

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW, Respondent, THE GUARD PUBLISHING CO. d/b/a *The Register-Guard* (Hereinafter *"The Register-Guard"*), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, ("Board"), files its exceptions to the February 21, 2002 Decision of the Administrative Law Judge John J. McCarrick ("ALJ").

The Register-Guard excepts:

1. To the conclusion of law that "Respondent has violated Section 8(a)(1) and (3) of the Act" (D.8, L.2-3; D.9, L. 23-24; D.10, L.7-9, 45-46; D.11, L. 1-9)[1] as such conclusion is contrary to the evidence in the Record as a whole and contrary to law.
2. To the conclusion of law that "Respondent has violated Section 8(a)(5) of the Act," (D.10, L.39-41), as such conclusion is contrary to the evidence in the Record as a whole and contrary to law.

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[1] References to the ALJ Decision and the transcript of testimony shall be designated by the Letters "D" and "Tr," respectively. References to the specific line(s) shall be designated by the letter "L."

3. To the conclusion of law that "The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act," (D.11, L. 1-9), as such conclusion is contrary to the evidence in the Record as a whole and contrary to law.

4. To the failure to find and conclude based on the Record evidence as a whole that Respondent did not violate the National Labor Relations Act ("Act") in any respect, and that the complaint should have been dismissed in its entirety. (D.14, L. 26-27).

5. To the cease and desist provisions of the ALJ's recommended order, and to each of them individually, as such cease and desist provisions are contrary to the evidence in the Record as a whole and contrary to the law. (D.11, L. 20-43).

6. To the affirmative action provision of the ALJ's recommended order, and to each of them individually, (D.11, L. 45; D.12, L. 1-25), as such affirmative action provisions are contrary to the evidence in the record as a whole and contrary to the law.

7. To the notice to employees recommended by the ALJ, (D.Appendix, i-ii), as such notice is contrary to the evidence in the Record as a whole and contrary to the law.

8. To the failure to find and conclude that, as a matter of law, the General Counsel at all times maintains the burden of persuasion, (D. 8, L. 27-30), as such failure to find and conclude as a matter of law is contrary to the law.

9. To the conclusion that, as a matter of law, the burden of persuasion shifts to the employer after the General Counsel presents a prima facie case of discrimination, (D. 8, L. 27-20; D. 9, L. 16-17), as such conclusion is contrary to law.

10. To the conclusion that, as a matter of law, the "employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that

the same action would have taken place even in the absence of the protected conduct," (D. 8, L. 3-33), as such conclusion is contrary to law.

11. To the failure to find and conclude that, as a matter of law, there is a relevant distinction between non-business, third party organizational use of the employer's communications equipment and personal, non-business use of an employer's communications equipment, (D. 8, L. 41-43; D. 9, L. 21-23), as such failure to find and conclude is contrary to law.

12. To the finding and conclusion that, as a matter of law, there is no relevant distinction between non-business, third party organizational use of the employer's communications equipment and personal, non-business use of an employer's communications equipment, (D. 8, L. 41-43; D. 9, L. 21-23), as such finding and conclusion is contrary to law.

13. To the finding and conclusion that Respondent permitted third party organizations such as Weight Watchers and United Way to send unsolicited mass e-mail to Respondent's employees at their Company-provided e-mail addresses, (D. 8, L. 40-41), as such finding and conclusion is contrary to the Record as a whole, (Tr. 403, L. 8-25; Tr. 230, L. 19-25; Tr. 231, L. 1-12, 23-25; Tr. 232, L. 1-3; Tr. 233, L. 15-21), and contrary to law.

14. To the failure of the ALJ to find that *The Register-Guard* has never allowed an outside organization of any kind to have employee e-mail addresses and to use those e-mail addresses to sell products or services for any such outside organization, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 403; Resp. Ex. 17, 19).

15. To the failure of the ALJ to find that the uncontradicted evidence of record is that *The Register-Guard*'s policy would not permit providing employees e-mail addresses to an outside organization such as Amway, a political party, a religious organization, or

organizations such as The Red Cross, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 402, L. 3-6).

16. To the failure of the ALJ to find that *The Register-Guard* would not, and has not, permitted an individual employee who works for the Company to utilize the Company's e-mail system to send mass communications to other employees to sell products such as Avon or Amway. (Tr. 402, L. 19-23).

17. To the failure of the ALJ to find that *The Register-Guard* has never permitted an employee to use the e-mail system to send a communication of any kind to other employees via e-mail to sell products or services for any outside organization, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 403, L. 8-17).

18. To the failure of the ALJ to find that *The Register-Guard* has never permitted an employee to use the e-mail system to send a communication of some kind to other employees via e-mail to solicit support for any outside organization, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 403, L. 18-19).

19. To the finding and conclusion that, as a matter of law, if an employer allows employees to use its communications equipment for non-work related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes, (D. 8, L. 43-46; D. 9, L. 21-23), as such finding and conclusion is contrary to law.

20. To the failure of the ALJ to find that the Company sponsored Weight Watchers as an employee benefit and that all Company communication concerning this employee benefit was through hard copy flyers, not the e-mail system, as such failure to find is contrary to

the substantial evidence in the Record as a whole. (Tr. 403, L. 22-25; Tr. 404, L. 1-3, 15-25; Tr. 405, L. 1-25; Resp. Ex. 19).

21. To the failure to find that Cynthia Walden gave uncontradicted testimony that Respondent, not the United Way, voluntarily sent e-mails to Respondent's employees regarding Respondent-sponsored campaigns involving the United Way, (Tr. 396, L. 7-19; Tr. 404, L. 1-24); (D. 4, L. 21-22), as said failure to find and conclude is contrary to the evidence in the Record as a whole, and contrary to law.

22. To the failure to find that Cynthia Walden gave uncontradicted testimony that Respondent voluntarily chose to support the United Way, as said failure to find is contrary to the evidence in the Record as a whole. (Tr. 250, L. 3-7; Tr. 396, L. 14-15).

23. To the failure to find that Respondent had the right to voluntarily promote causes in conjunction with a third party organization, such as Weight Watchers and the United Way, without losing its right to prohibit individuals, third party organizations or individuals acting on behalf of third party organizations from sending unsolicited mass e-mail to Respondent's employees at the employees' Company-provided e-mail accounts, as such failure to find and conclude is contrary to law.

24. To the finding and conclusion that Respondent did not have the right to voluntarily promote causes in conjunction with a third party organization, such as Weight Watchers (through paper letters) and the United Way (via e-mail), without losing its right to prohibit individuals, third party organizations or individuals acting on behalf of third party organizations from sending unsolicited mass e-mails to Respondent's employees at the employees' Company-provided e-mail accounts, (D. 8, L. 40-42; D. 9, L. 21-23), as such failure to find and conclude is contrary to law.

25. To the failure to find and conclude that, as a matter of law, Respondent had the right to allow the United Way to send e-mails to Respondent's work e-mail addresses, even if Respondent prohibited union-sponsored, unsolicited, organizational mass e-mail to Respondent's employee's Company-provided e-mail addresses, as such failure to find and conclude is contrary to the evidence in the Record as a whole, and contrary to law.

26. To the finding of fact and conclusion of law that Respondent failed to enforce its Communications Policy, (D. 8, L. 46-47; D. 9, L. 20-21; D. 10, L. 34-36), as such finding of fact and conclusion of law is contrary to the facts in the Record as a whole, (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 403, L. 8-25; Tr. 394, L. 24-25; Tr. 395, L. 1-20; Resp. Ex. 17, 19; G.C. Ex. 4), and contrary to law.

27. To the conclusion that, as a matter of law, Respondent, having permitted a wide variety of non-business uses of e-mail for personal reasons, cannot validly prohibit e-mail dealing with Section 7 subjects, (D. 8, L. 48-49), as such conclusion of law is contrary to law.

28. To the finding and conclusion of law that management's use of Respondent's communication's system is relevant to whether Respondent discriminatorily applied its Communications Policy among employees, (D. 9, L. 2-3), as such finding and conclusion of law is contrary to law.

29. To the failure to find that Company managers are not bound to obey generally applicable work rules, and that the failure of management employees to follow the Company's work rules is not relevant in determining whether the Company disparately enforced its facially valid 1996 Communications System Policy with respect to union organizational

distributions over the Company's e-mail system, as such failure to find and conclude is contrary to established Board law.

30. To the failure to find that Respondent prohibited individuals and outside third party organizations from sending e-mail to Respondent's employees through Respondents communications system. (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 403, L. 8-25; Tr. 394, L. 24-25; Tr. 395, L. 1-20; Tr. 403; Resp. Ex. 17, 19; G.C. Ex. 4).

31. To the finding of fact and conclusion of law that Suzi Prozanski's use of Respondent's e-mail system was not a more egregious violation of Respondent's Communication Policy because she sent e-mail to multiple persons (spam), (D. 9, L. 1-2), as such finding of fact and conclusion of law is contrary to the evidence in the Record as a wholes, and contrary to law.

32. To the finding of fact and conclusion of law that there is no evidence in the Record that sending e-mail to many addresses has any adverse impact on discipline or production, (D. 9, L. 3-5), as such finding of fact and conclusion of law is contrary to the evidence in the Record as a whole, (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 395, L. 1-20; Tr. 394, L. 24-25; Tr. 403, L. 8-25; Resp. Ex. 17, 19; G.C. Ex. 4), and contrary to law.

33. To the failure to find and conclude that, as a matter of law, sending a copy of an e-mail to many of Respondent's employees' e-mail addresses burdens Respondent's communications system, (D. 9, L. 3-5), as such failure to find and conclude, as a matter of law, is contrary to the evidence in the Record as a whole, (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 395, L. 1-20; Tr. 394, L. 24-25; Tr. 403, L. 8-25; Resp. Ex. 17, 19; G.C. Ex. 4), and contrary to law.

34. To the failure of the ALJ to find that *The Register-Guard* had a three (3) million dollar investment in its electronic communications systems, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 351, L. 24-25; Tr. 352, L. 1-9).

35. To the failure of the ALJ to analyze the Company's Communications Policy in the context of private property rights as articulated by the U.S. Supreme Court in Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 112 S.Ct. 841 (1992), as such failure is contrary to law.

36. To the failure of the ALJ to find and conclude that, as a matter of law, a Union's trespass to property, in derogation of the employer's private property rights, is only justified in the most extreme circumstances where the Union can demonstrate no reasonable alternative channels of communication with the employees, as such failure to find is contrary to law.

37. To the failure to find and conclude that Respondent provided employees with bulletin boards and other resources through which to post union notices, as said failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. 117; Tr. 118; Tr. 119; Tr. 212; Tr. 76, L. 17-20; Tr. 124, L. 3-25; Tr. 384, L. 18-25; Tr. 204, L. 22-25; Resp. Exs. 3, 5; Tr. 239, L. 20; Tr. 240, L. 5-11; Tr. 258, L. 1-25; G.C. Ex. 62), and contrary to law.

38. To the failure to find and conclude that, as a matter of law, the mass e-mails sent by Suzi Prozanski on behalf of the charging party to Respondent's employees' Respondent-provided e-mail accounts constituted a trespass to chattles, as such failure to find and conclude is contrary to law and the evidence in the Record as a whole. (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 395, L. 1-20; Tr. 394, L. 24-25; Tr. 403, L. 8-25; Resp. Ex. 17, 19; G.C. Ex. 4).

39. To the failure to find and conclude that the unit members and the Union had the ability to distribute, solicit and otherwise conduct Union business through the following mediums and avenues of communication: 1) The Union's monthly printed publication called *The Guardian*, which the Union distributes to employees, (Tr. 118); 2) The written bargaining bulletins paid for and distributed by the Union in order to update its members on collective bargaining issues, (Tr. 119; Tr. 121); 3) The Company provides the Union with the names and addresses of all the employees so the Union may send them things through the U.S. Mail, (Tr. 125); 4) By agreement with the Company, the Union has Union bulletin boards in all the departments where it represents employees and, in the cafeteria, (Tr. 117-118; Resp. Ex. 3); 5) Personal conversation, (Tr. 76, L. 17-20; Tr. 124, L. 3-25; Tr. 384, L. 18-25; Tr. 204, L. 22-25; Resp. Ex. 5); 6) Displaying pro-Union signs in personal automobiles, (Tr. 239, L. 20); 7) Wearing armbands when not working with the public. (Tr. 240, L. 5-11; Tr. 258, L. 1-25; G.C. Ex. 62), as such failure to find and conclude is contrary to the evidence in the Record as a whole.

40. To the failure to find and conclude that, as a matter of law, because the mass e-mails sent by Suzi Prozanski on behalf of the charging party to Respondent's employees' Respondent-provided e-mail accounts constituted a trespass to chattels, Respondent's proscription against such activity did not violate the Act, as such failure to find and conclude is contrary to law and the evidence in the Record as a whole. (Tr. 65, L. 12-16; Tr. 66, L. 8-10, 12-23; Tr. 68, L. 19-21; Tr. 395, L. 1-20; Tr. 394, L. 24-25; Tr. 403, L. 8-25; Resp. Ex. 17, 19; G.C. Ex. 4).

41. To the failure to find and conclude that, as a matter of law, the Act was not meant to disturb the application of state property laws and that Respondent, therefore, did not

violate the Act by prohibiting Suzi Prozanski from sending e-mail to multiple employee e-mail accounts (spam) provided by Respondent to Respondent's employees, as such failure to find and conclude is contrary to Board law.

42. To the failure of the ALJ to find that the parties agreement allows the Guild to post anything it wants to concerning Union business on the multiple bulletin boards contained in the various departments by agreement of the parties, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 139, L. 5-9; Resp. Ex. 3).

43. To the failure of the ALJ to find that it is clear that Prozanski could have gotten her message across by utilizing the bulletin boards because the evidence is she printed a hard copy of her mass e-mail and placed it in the receptacle on the bulletin board in her department, as such failure to find is contrary to the evidence in the Record as a whole. (Tr. 329, L. 8-16).

44. To the finding and conclusion of the ALJ that the enforcement by *The Register-Guard* of its 1996 Company Communications Policy, by its warning to Suzi Prozanski on May 5 and August 22, 2000, is not time barred by Section 10(b) of the Act, (D. 1, L. 6-7; n. 1), as said finding and conclusion is contrary to the substantial evidence in the Record as a whole, and contrary to established Board law.

45. To the failure of the ALJ to find and conclude that the allegations contained in NLRB case nos. 36-CA-8743 and 36-A-8849 are not time barred by Section 10(b) of the Act, (D. 1, n. 1), as said failure to find and conclude is contrary to established Board law.

46. To the failure of the ALJ to find the fact that Union President Suzi Prozanski admitted in writing in a May 5, 2000 memorandum to management that the 1996 Company's Communications Policy was the established agreement of the parties with Prozanski

stating "I should have known this" and further stating "I will do my best to make sure that others in the Guild are aware of the company's email policy," as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 110, L. 13-25; Tr. 111, L. 1-7; Resp. Ex. 2).

47. To the failure of the ALJ to find that the Union had ample means to communicate to the bargaining unit through specifically agreed upon distribution methods in light of Respondent's compliance with a non-board settlement agreement dated October 23, 2000, which specifically provides for Union only bulleting boards in the newsrooms, advertising department, business office and circulation department, and that said bulleting boards contain a receptacle to allow for the distribution of written literature by the Union, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Resp. Ex. 3; Tr. 116, L. 5-25; Tr. 117, L. 1-25; Tr. 118, L. 1-9).

48. To the failure to find and conclude that, as a matter of law, the Company's Communications Systems Policy has been in place since 1996, that Company's enforcement of said policy in 2000 was merely an enforcement of the status quo, and that all charges related to Respondent's May 2000 enforcement of its 1996 Communications System Policy are barred by Section 10(b) of the Act, (D. 1, L. 7, n. 1), as such failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. 63, L. 6-18; Tr. 386, L. 15-25; Tr. 387, L. 1-25; Tr. 388, L. 1-25; Tr. 389, L. 1-25).

49. To the finding and conclusion that copies of union bargaining bulletins that were distributed after bargaining sessions and kept by Respondent as part of its business records, were not admissible to show what was discussed by Respondent and the charging party during 1996 negotiations or that Respondent was merely enforcing the

status quo in 2000, (Resp. Ex. 14, 16), as said finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 388, L. 1-25; Tr. 389, L.1-25; Tr. 390, L. 1-25; Tr. 391, L. 1-25; Tr. 392, L. 1-21), and contrary to law.

50. To the failure of the ALJ to find that there existed no contract provision or past practice allowing the union the right to use the Company's e-mail system for Union business, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 63, L. 6-18; Tr. 386, L. 15-25; Tr. 387, L. 1-25; Tr. 388, L. 1-25; Tr. 389, L. 1-25).

51. To the failure to find that the charging party did not file a grievance over the letter sent by Dave Baker to Suzi Prozanski on May 5, 2000, (Tr. 393, L. 1-9; G.C. Ex. 8), and the failure to weigh that evidence in favor of finding that Respondent did not violate the Act in its enforcement of its 1996 Communications System Policy, and that Section 10(b) of the Act bars all charges related to Respondents enforcement of said policy, as said failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. 287, L. 1-25; Tr. 288, L. 15-21; Tr. 289, L. 2-8; Tr. 393, L. 1-9; G.C. Ex. 8), and contrary to law.

52. To the failure of the ALJ to find the fact that on May 30, 1997, manager C.J. Heaton sent a memo to Union officer Bill Bishop, stating that the Union was prohibited from using the Company's e-mail system for Union business and that the Union filed neither a grievance nor an unfair labor practice over this memo given to Mr. Bishop, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Resp. Ex. 7; Tr. 287, L. 7-25; Tr. 288, L. 1-21).

53. To the failure of the ALJ to find the fact that Union President Suzi Prozanski admitted that she could not send the mass e-mails to employees from her computer at work, as

such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 87, L. 1-25; Tr. 88, L. 20-25; Tr. 89, L. 1-11).

54. To the finding of the ALJ that all employees at *The Register-Guard*, with the exception of fifteen (15) district managers have access to e-mail, (D. 3, L. 9-10), as such finding is unsupported by any evidence in the Record as a whole.

55. To the finding of the ALJ that Managing Editor Dave Baker stated to Prozanski, after she stated she was going to send the mass e-mail, "Okay, I understand," (D. 3, L. 40-41), as such finding is contrary to the evidence in the Record as a whole. (Tr. 327, L. 18-23; Tr. 328, L. 6-25; tr. 329, L. 1-25; tr. 138, L. 10-16).

56. To the failure of the ALJ to find that Managing Editor Dave Baker told Union President Suzi Prozanski to wait and not send the e-mail and that when Baker did not grant her permission, she sent the e-mail anyway, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 329, L. 5-16).

57. To the failure of the ALJ to find and conclude that *The Register-Guard* has had a long-standing policy restricting the wearing of insignia by employees who meet the public or customers on behalf of *The Register-Guard*, as such failure to find and conclude is contrary to the evidence in the Record as a whole. (Tr. 331-334, 356-360; Resp. Ex. 10; Resp. Ex. 21-22).

58. To the failure of the ALJ to find that Managing Editor Dave Baker did not give Union President Suzi Prozanski permission to send the mass e-mail; rather Prozanski ignored Baker because she was mad, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 138, L. 10-16).

59. To the failure of the ALJ to find that the long-standing Company policy restricting the wearing of insignia by employees who meet the public and/or customers in their jobs, was a past practice and is an implied term of the parties collective bargaining agreement as evidenced by rejected Respondent Exhibit 22 and Respondent Exhibit 21, as such failure to find is contrary to rejected and admitted evidence in the Record as a whole. (Tr. 414-416).

60. To the ALJ's engaging in contract interpretation to determine whether Respondent's enforcement of the 1996 Communications System Policy, either in part or in whole, in 2001 violated the Act, or is part of the parties' collective bargaining agreement as said decision is contrary to Board law.

61. To the ALJ's engaging in contract interpretation to determine whether Respondent's enforcement of the Company's insignia policy an implied part of the parties collective bargaining agreement, or a violation of the Act, as said decision is contrary to Board law.

62. To the finding and conclusion that, as a matter of law, *The Register-Guard* failed to show any special circumstances that would justify its ban on Kangail's armband and placard while dealing with newspaper carriers and subscribers in his district, and that the mere exposure of customers to employees wearing union insignia does not constitute a special circumstance, (D. 9, L. 43-45, 52; D. 10; L. 1-3), as such finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 252-259, 372, 379), and contrary to law.

63. To the failure of the ALJ to find that special circumstances existed to justify preventing Ron Kangail from wearing a green armband and having a placard in his car while in his district dealing with newspaper carriers, subscribers, and non-subscribers, as such failure

to find is contrary to the substantial evidence in the Record as a whole, in light of the facts:

a. In the district Mr. Kangail signed contracts with independent contractor newspaper carriers as "Guard Publishing Company representative." (Tr. 253; Resp. Ex. 6).
b. At the time, Ron Kangail managed district 400 which had contracts with 60 independent contractor newspaper carriers who collectively on a daily basis purchased 2,800 newspaper from *The Register-Guard*. (Tr. 254-255).
c. As a district manager, it was part of his job to do everything reasonably possible to have these carriers sell more subscriptions and therefore earn more money for *The Register-Guard*. (Tr. 255).
d. As a district manager, it was part of Ron Kangail's responsibility to maintain a good *Register-Guard*/newspaper carrier relationship. (Tr. 255-256).
e. As a district manager, it was part of Ron Kangail's job to maintain a good *Register-Guard*/subscriber relationship. (Tr. 256).
f. It was Ron Kangail's responsibility to use his best efforts to run the district in a way to maximize the number of subscribers. (Tr. 256).

64. To the failure of the ALJ to find that Circulation Department District Managers, when in the field in the execution of their duties, represent *The Register-Guard* and are to put *The Register-Guard* in the best light possible with newspaper carriers and subscribers with whom they come in contact, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 251, L. 24-25; Tr. 252, L. 1-7; Tr. 378-379; Resp. Ex. 6).

65. To the finding of the ALJ that "no probative evidence was adduced that Kangail's display adversely effected respondent's business, employee safety, or employee discipline," (D. 10, L. 3-5), as such finding is contrary to the substantial evidence in the Record as a whole, and contrary to law.

66. To the failure of the ALJ to find and conclude that special circumstances existed to justify a ban on district manager Ron Kangail wearing a green armband and having a placard displayed in his vehicle in his district while he was on duty, as such failure to find

and conclude is contrary to the substantial evidence in the Record as a whole, in light of the fact that the armband and placard, in combination with radio ads run by the Union and television coverage, was part of the Union's attempt to put *The Register-Guard* in a bad light with the public, including the public in the district Ron Kangail managed. (Tr. 257).

67. To the failure of the ALJ to find and conclude that a potential threat to the employer's "public image" may constitute special considerations permitting an employer to prohibit wearing insignia or buttons, as such failure to find and conclude is contrary to law.

68. To the failure of the ALJ to find that Ron Kangail, as a District Manager, had the duty to maintain a good *Register-Guard* subscriber relationship, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 256).

69. To the failure of the ALJ to find that one of Ron Kangail's duties as a District Manager was to run the district in a way to maximize the number of subscribers, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 256).

70. To the failure to allow Respondent's counsel to review all of the Board Affidavits of witnesses who testified on behalf of the Charging Party. (Tr. 184, L. 14-25; Tr. 185, L. 1-25; Tr. 186, L. 1-25; Tr. 187, L. 1-25; Tr. 196, L. 5-25; Tr. 197, L. 1-25; Tr. 198, L. 1-25; Tr. 200, L. 10-25).

71. To the failure of the ALJ to find that the green armband and the placard were designed to cause the public to side with Eugene Newspaper Guild in its dispute with *The Register-Guard* concerning the negotiation of the new contract, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 256-260).

72. To the failure of the ALJ to find that Ron Kangail, District Manager, when in his district performing his duties, is the representative of *The Register-Guard*, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 253; Resp. Ex. 6).

73. To the failure of the ALJ to find that as a District Manager, Ron Kangail was to do everything reasonable possible to encourage newspaper carriers sell more subscriptions for *The Register-Guard* and therefore earn more money for *The Register-Guard*, as said failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 255).

74. To the failure of the ALJ to find that Ron Kangail, as a District Manager, had a responsibility to maintain a good *Register-Guard*/newspaper carrier relationships, as such failure to find is contrary to the substantial evidence in the Record as a whole. (Tr. 255-256).

75. To the failure to find that Respondent asked Ron Kangail to refrain from displaying union placard in his car only when dealing with the public, (D. 9, L. 50-52), as such failure to find is contrary to the evidence in the Record as a whole. (Tr. 243, L. 16-22; Tr. 260, L. 20-25; Tr. 263, L. 1-12; Tr. 264, L. 1-16; Tr. 265, L. 9-12; Tr. 373, L. 1-8; Tr. 265, L. 18-21; Tr. 373, L. 9-21).

76. To the failure to find that Ron Kangail had union insignia displayed in his cubicle, and that Respondent had not asked Ron Kangail to refrain from displaying and/or wearing union insignia in his cubicle at any time in the past, because Kangail did not have contact with the public in his cubicle and because there was not a second chair for visitors to sit on in his cubicle, as such failure to find is contrary to the unrebutted evidence in the Record as a whole. (Tr. 373, L. 9-21).

77. To the finding and conclusion that Respondent had the burden to show that it has been adversely affected by Ron Kangail's wearing and displaying of union insignia before it could proscribe said activity, (D. 10, L. 3-4), as said finding and conclusion is contrary to law.

78. To the finding that Respondent's insignia policy was vague, (D. 10, L. 4-5), or applied in a discriminatory manner against union insignia, (D. 10, L. 45-46), as said finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 368, L. 4-10; Tr. 376, L. 1-6; Tr. 378, L. 18-25; Tr. 379, L. 1-13; Tr. 359, L. 15-23; Tr. 360, L. 3-15), and contrary to law.

79. To the failure to find and conclude that, to the extent the charging party may argue that Respondent's insignia policy was vague, (D. 10, l. 4-5), such an argument is not a proper basis for an unfair labor practice charge, but rather reflects a contract interpretation issue that is for the courts to determine, not the Board, as said failure to find and conclude is contrary to Board law.

80. To the finding and conclusion that how Respondent applied its insignia policy to Respondent's management employees is relevant to determining whether Respondent's promulgation and enforcement of its insignia policy violated the Act, (D. 10, L. 6-7), as such finding and conclusion is contrary to Board law.

81. To the failure to find and conclude that, as a matter of law, Respondent could proscribe the wearing or displaying of union insignia by employees when they were in contact with the public, even though it allowed employees to wear attire promoting sports teams or the United States Armed Forces, (D. 10, L. 5-7), as such failure to find and conclude is contrary to law.

82. To the finding of the ALJ that the testimony of Advertising Director Michael Raz and Circulation Director Chuck Downing about wearing insignia was contradictory, (D. 5, L. 5–7), as said find is not supported by the substantial evidence in the Record as a whole. (Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 368, L. 4-10; Tr. 376, L. 1-6; Tr. 378, L. 18-25; Tr. 379, L. 1-13; Tr. 359, L. 15-23; Tr. 360, L. 3-15).

83. To the failure of the ALJ to find that Counterproposal No. 26 of *The Register-Guard* was a lawful proposal about a mandatory subject of bargaining as such failure to find is contrary to the substantial evidence in the Record as a whole, (Tr. 403, L. 8-25; Tr. 230, L. 19-25; Tr. 231, L. 1-12, 23-25; Tr. 232, L. 1-3; Tr. 233, L. 15-21), and contrary to law.

84. To the finding and conclusion that, as a matter of law, Respondent's Counterproposal No. 26 is an unlawful codification of a discriminatory policy that constitutes an illegal subject of bargaining, (D. 10, L. 36-38, n. 11), as such finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 403, L. 8-25; Tr. 230, L. 19-25; Tr. 231, L. 1-12, 23-25; Tr. 232, L. 1-3; Tr. 233, L. 15-21), and contrary to law.

85. To the finding and conclusion that as a matter of law, the union could, through the collective bargaining process, waive the unit members' rights, if any, to use Respondent's communication system, regardless of whether Respondent had previously enforced its 1996 Communications System Policy in a discriminatory manner, (D. 10, L. 35-38), as such failure to find and conclude is contrary to law.

86. To the finding and conclusion that, as a matter of law, Respondent refused to withdraw Counterproposal No. 26 from the bargaining table, (D. 10, L. 40-41), as said finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 443, L. 4-20; Tr. 444, L. 6-13), and contrary to law.

87. To the failure to find and conclude that, as a matter of law, Respondent never bargained to impasse over Respondent's Counterproposal No. 26, (D. 10, L. 28-41), as the failure to find and conclude is contrary to the evidence in the Record, (Tr. 443, L. 4-20; Tr. 444, L. 6-13), and contrary to law.

88. To the failure of the ALJ to find that *The Register-Guard* proposed Company Counterproposal No. 26 and that the Union neither accepted nor rejected it and at no time asked the Company to withdraw it, as said failure to find is contrary to the substantial evidence in the Record as a whole, (Tr. 443, L. 15-20; Tr. 444, L. 10-13), and contrary to law.

89. To the finding and conclusion that Board law holding that an employer's computer access policy and the use of other communications equipment is a mandatory subject of bargaining is irrelevant to the issue of whether Respondent's Counterproposal No. 26 constituted an illegal subject of bargaining, (D. 10, L. 36-38, n. 11), as such finding and conclusion is contrary to established Board law.

90. To the failure to find that Respondent's Counterproposal No. 26 dealt with a mandatory subject of bargaining over which both the Company and the charging party had the right and the obligation to bargain, and over which either side had the right to bargain to impasse, (D. 10, L. 36-38, n.11), as such failure to find and conclude is contrary to established Board law.

91. To the failure to find and conclude that whether Respondent's Communications System Policy and, consequently, Respondent's Counterproposal No. 26, spoke to a mandatory subject of bargaining, (D. 10, L. 36-38, n.11), is relevant in determining whether

Company Counterproposal No. 26 deals with an illegal subject of bargaining, as such failure to find and conclude is contrary to established Board law.

92. To the failure to find and conclude that, as a matter of law, a subject cannot be both a mandatory subject of bargaining and an illegal subject of bargaining, (D. 10, L. 36-38, n. 11), as such failure to find and conclude is contrary to established Board law.

93. To the finding and conclusion that, as a matter of law, a subject can be both a mandatory subject of bargaining and an illegal subject of bargaining, (D. 10, L. 36-38, n. 11), as such finding and conclusion is contrary to Board law.

94. To the finding and conclusion that, as a matter of fact and law, Respondent insisted upon Counterproposal No. 26, (D. 11, L. 7), as such finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 443, L. 4-20; Tr. 444, L. 6-13), and contrary to Board law.

95. To the failure to find that at the most recent bargaining session between the parties in April 2001, the Union did not even communicate to Respondent that it believed Company Counterproposal No. 26 pertained to an illegal subject of bargaining and that the Union told Respondent that it was not saying that the proposal did not pertain to a mandatory subject of bargaining, as said failure to find and conclude is contrary to the evidence in the Record as a whole. (Tr. 443, L. 4-20; Tr. 444, L. 6-13).

96. To the failure to find that Respondent and the charging party bargained over Respondent's 1996 Communications System Policy, (D. 3, L. 22-23), as such failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. 63, L. 6-18; Tr. 386, L. 15-20; Resp. Ex. 12; Resp. Ex. 13; Resp. Ex. 14; Resp. Ex. 15), and contrary to law.

97. To the failure to find that the charging party admitted in its letters to Respondent that Respondent's Communications System Policy was a mandatory subject of bargaining, (Resp. Ex. 12, 13, 14, 15; Tr. 110-111), as such failure to find and conclude is contrary to the evidence in the Record as a whole, and contrary to law.

98. To the finding that Respondent enforced its 1996 Communications System Policy with respect to Suzi Prozanski for the purposes of discriminating against Ms. Prozanski based on her union activity, (D. 9, L. 23-24; D. 11, L. 4-5), as said finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. 403, L. 8-25; Tr. 230, L. 19-25; Tr. 231, L. 1-12, 23-25; Tr. 232, L. 1-3; Tr. 233, L. 15-21; Tr. 402; Resp. Ex. 2; Tr. 396; Tr. 250; Tr. 65-68), and contrary to law.

99. To the failure to find that because all charges related to Respondent's enforcement of its 1996 Communications System Policy are time barred by Section 10(b) and reflect a maintenance of the status quo, Respondent's Counterproposal No. 26 is not an unlawful codification of a discriminatory policy and an illegal subject of bargaining, (D. 10, L. 34-38), as such failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. 403, L. 8-25; Tr. 230, L. 19-25; Tr. 231, L. 1-12, 23-25; Tr. 232, L. 1-3; Tr. 233, L. 15-21), and contrary to law.

100. To the failure to find that the General Counsel failed to meet its burden of persuasion that Respondent's proffered legitimate, non-discriminatory reason for enforcing its 1996 Communications System Policy with respect to Suzi Prozanski was a pretext for an unlawful discriminatory motive, as such failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. 403, L. 8-25; Tr. 230, L. 19-25; Tr. 231, L. 1-12, 23-25; Tr. 232, L. 1-3; Tr. 233, L. 15-21), and contrary to law.

101. To the finding that Respondent enforced its insignia policy with respect to Ron Kangail for the purposes of discriminating against Mr. Kangail based on his union activity, (D. 10, L. 45-46; D. 11, L. 1-2), as said finding and conclusion is contrary to the evidence in the Record as a whole, (Tr. Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 368, L. 4-10; Tr. 376, L. 1-6; Tr. 378, L. 18-25; Tr. 379, L. 1-13; Tr. 359, L. 15-23; Tr. 360, L. 3-15), and contrary to law.

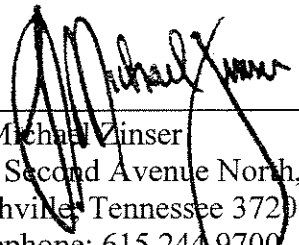
102. To the failure to find that the General Counsel failed to meet its burden of persuasion that Respondent's proffered legitimate, non-discriminatory reason for enforcing its insignia policy with respect to Ron Kangail was a pretext for an unlawful discriminatory motive, as such failure to find and conclude is contrary to the evidence in the Record as a whole, (Tr. Tr. 357, L. 14-25; Tr. 358, L. 1; Tr. 368, L. 4-10; Tr. 376, L. 1-6; Tr. 378, L. 18-25; Tr. 379, L. 1-13; Tr. 359, L. 15-23; Tr. 360, L. 3-15), and contrary to law.

CONCLUSION

For all the foregoing reasons, *The Register-Guard* respectfully requests that the Second Consolidated Complaint, all amendments thereto, and all underlying charges be dismissed in their entirety, that the Exceptions of *The Register-Guard* be granted and that the Decision of the ALJ be reversed to the extent that Respondent has excepted thereto.

Respectfully submitted this 10th day of April, 2002,

THE ZINSER LAW FIRM, P.C.



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Matthew Salada

CERTIFICATE OF SERVICE

I hereby certify this 10th day of April, 2002, that I caused to be served a copy of Respondent's Exceptions to the Decision of the Administrative Law Judge via facsimile and Federal Express to the following:

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National Labor Relations Board
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Respectfully,

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